IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2657 OF 1991

1. Narayan Karwa)
)
2. Jaichandlal Karwa)
)
3. Narayanbhai Karwa (deleted))
)
3(a) Purshottan Karwa)
son of the deceased)
Narayanbhai Karwa)
)
4. Ramchander Karwa)
Petitioner Nos.1 to 4 all)
of Bombay, Indian Inhabitant)
residing at Kamal Kunj,)
87-B, Bomanji Petit Road,)
Bombay - 400 036.)

5. Messrs. Ashokkumar & Co.,)
a Partnership firm)
occupying certain premises)
at Kamal Kunj, Bomanji)
Petit Road, Bombay 400 036.)

6. Messrs.Chemilate Agencies,)
a partnership firm)
occupying certain premises)
at Kamal Kunj, Bomanji)
Petit Road, Bombay 400 036.).. Petitioners.

Versus

1. Union of India)

2. Vijay M. Pangam,)
Tax Recovery Officer,)
outstation Charge, having)
his office at Mittal Court,)
3rd Floor, Nariman Point,)
Bombay - 400 021.)

3. Amta Desai,)
Commissioner of Income Tax,)
Bombay City - VIII, Bombay)
having his office at)

Earnest House, Nariman Point)
Bombay - 400 021.)

4. Suresh Mehta,)
Bombay Indian Inhabitant)
residing at Muni Survat,)
Kama Lane, Ghatkopar (W),)
Bombay - 400 086.).. Respondents.

Mr.J.D. Mistry with Mr.A.K. Jasani i/by Mr.S.M. Shah for the petitioners.

Mr.Ashok Kotangale with Mr.S.R. Chauhan for respondent Nos.1 to 3 - Union of India.

Mr.Jay Chinoy with Mr.Kamal Katha i/by M/s.Chitnis Vaithy & Co. for respondent No.4.

CORAM : DR.S. RADHAKRISHNAN &
J.P. DEVADHAR, JJ.

DATED : 6TH MARCH, 2007.

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. The petitioners who claim to be the tenants of a bungalow known as Kamal Kunj, situated at Bomanji Petit Road, Mumbai - 400 036 ('disputed property' for short) have filed this petition mainly to challenge two orders passed by the Tax Recovery Officer ('TRO' for short), namely order dated 9th July, 1991 and order dated 11th July, 1991. By order dated 9th July, 1991, the TRO has rejected the application made by the petitioner under Rule 60 of the Second Schedule to the Income Tax Act, 1961 ('the Act' for short) for setting aside the auction sale of the disputed property held on 7th November, 1990. By order dated 11th July, 1991, the TRO has

confirmed the auction sale of the disputed property in favour of the respondent No.4. During the pendency of this writ petition, the appeal filed by the petitioners against the order dated 9th July, 1991 has been dismissed by the C.I.T. Hence, the petition has been amended to challenge the said order passed by C.I.T. as well.

2. The facts relevant for the present petition are that one Sultan Karim Mithani was the owner of the disputed property. The said Mithani appears to have gifted the disputed property to Mrs.Kamala Chandwani by executing a gift deed on 20th February, 1974. The said gift deed was lodged for registration on 28th February, 1974. Mrs.Kamla Chandwani inducted the petitioners as tenants in the disputed property during the period from 1974-75. The petitioners are in peaceful possession and enjoyment of the disputed property since 1974-75.

3. On 3rd November, 1979, the TRO attached the disputed property with a view to recover the tax arrears payable by the tax defaulter Sultan Karim Mithani. Mrs.Kamla Chandwani objected to the attachment of the disputed property by filing an application before the TRO contending that she is the owner of the disputed property and that the disputed property belonging to her cannot be

attached for the tax default committed by Sultan Karim Mithani. The said application was rejected by the TRO on 28th February, 1984 under Rule 11 of the second Schedule to the Act and a proclamation of sale was issued to sell the disputed property by auction sale. Thereupon Mrs.Kamla Chandwani filed a suit bearing Long Cause Suit No.713 of 1984 in the High Court at Bombay to challenge the order dated 28th February, 1984 passed by the TRO under Rule 11 as well as the proclamation of sale. On a draft Notice of Motion taken out by Mrs.Kamla Chandwani in the said suit, this Court passed an order on 30th March, 1984 to the effect that the TRO may proceed to auction the disputed property but the sale shall not be confirmed until further orders of the Court.

4. Before the disputed property was sold in auction, the petitioners by their letter dated 28th March, 1988 called upon the TRO to bring to the notice of all the purchasers about their tenancy rights. The TRO by an order dated 31st August, 1989 rejected the application of the petitioners under Rule 11 of the Second Schedule inter alia on the ground that the disputed property has been under attachment since 1969 and, therefore, as per Section 281 of the Income Tax Act, 1961, the tax defaulter Mr.Mithani could not have gifted the property to Mrs.Kamla Chandwani in the year 1974 and

consequently, the tenancy created in favour of the petitioners by Mrs.Kamla Chandwani are void. Thereupon, the petitioners filed declaratory suits in the Court of Small Causes at Bombay and obtained injunction orders restraining the defendants therein from interfering with the possession of the disputed property in the hands of the petitioners without the due process of law and the said proceedings are pending. The petitioners had also challenged the order of the TRO dated 31st August, 1989 by filing S.C. Suit No.4248 of 1992 in the City Civil Court at Bombay and by a judgment and order dated 2nd February, 2001, the learned Judge of the City Civil Court at Bombay has set aside the order of the TRO dated 31st August, 1989.

5. In the meantime, the TRO issued a proclamation of sale on 25th September, 1990 specifically stating therein that the auction sale of the disputed property would be held on 5th November, 1990 subject to the tenancy rights claimed by the petitioners in the declaratory suits pending in the Court of Small Causes at Bombay. In the terms and conditions of auction issued along with the proclamation of sale it was specifically stated that the petitioners are in possession of the disputed property and that the said property will be sold on ‘as is where is’ basis. Clause 24 and 25 of

the terms and conditions of sale reads thus :-

> "24. On sale of property the person declared to be the purchaser shall pay immediately after such declaration, a deposit of 25% of the amount of purchase money to the Officer conducting the sale, in cash, pay order or demand draft drawn in favour of 'The Tax Recovery Officer, Outstation charge, Bombay'. In default of such default of such deposit the property shall forthwith be resold by auction. The balance of 75% of the purchase price together with poundage fees, registration charges & Stamp Duty shall be paid in TRO's office on or before 15th day from the date of auction sale. Under no circumstances this period of 15 days can be extended by any authority. If the total purchase price is not paid 25% deposit amount paid on auction sale, the costs of the auction will be deducted and the balance may be forfeited to the Government as per provisions under Second Schedule to the I.T. Act, 1961.
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> 25. The sale of the property will be confirmed only after the decision of the Bombay High Court in L.C. Suit No.713 of 1984 and only on confirmation, the sale becomes absolute. before confirmation of sale if the entire arrears taxes and interest if paid by the defaulter then in that case the auction sale shall automatically be cancelled."

6. On 5th November, 1990, the petitioners and other bidders were present at the time and place where the auction sale of the disputed property was to take place. However, the TRO without assigning any reasons postponed the auction to 7th November, 1990.

7. On 6th November, 1990, a letter was

addressed by the TRO to Mrs.Kamla Chandwani's advocates stating therein that after the auction sale of the disputed property, the petitioners who claim to be the tenants thereof will have to vacate the disputed property.

8. In the auction held on 7th November, 1990, the highest bid for Rs.72,00,000/- offered by the respondent No.4 was accepted. As per the terms of proclamation of sale, the respondent No.4 paid a sum of Rs.18,00,000/- being 25% of the total purchase price, by bank draft dated 6th November, 1990 immediately on acceptance of the bid. As per the terms of the auction sale, the respondent No.4 was obliged to pay the balance amount on or before 15th day from the date of auction sale.

9. After the disputed property was auctioned, the petitioners on 19th November, 1990 made an application before the TRO under Rule 60 of Schedule II to the Act for setting aside the auction sale of the disputed property held on 7th November, 1990 inter alia on the ground that their interests will be affected if the disputed property is auctioned to recover the tax arrears payable by the tax defaulter Sultan Karim Mithani. Along with the said application, the petitioners forwarded a bank draft for Rs.30,00,000/- being the tax arrears of

Sultan Karim Mithani specified in the proclamation of sale. The petitioners offered to deposit immediately, if any further amount of tax arrears is found payable. By a letter dated 23rd November, 1990, the TRO informed the petitioners that the total tax arrears together with the amount payable to the purchaser at 5% of the purchase money for setting aside the auction sale comes to Rs.30,74,079/-. As the petitioners had already deposited a sum of Rs.30,00,000/-, by the said letter the TRO called upon the petitioners to deposit the balance amount of Rs.74,079/-. Accordingly, the petitioners deposited the balance amount of Rs.74,079/- and the TRO by his letter dated 29th November, 1990 confirmed that the total amount of Rs.30,74,079/- deposited by the petitioners covers taxes, interest on demand, cost, charges, expenses and compensation payable to the auction purchaser on setting aside the auction sale. It was further stated in the said letter that the application for setting aside the sale filed by the petitioners will be considered in due course.

10. In the meantime, on 21st November, 1990, the respondent No.4 moved a draft Notice of Motion in Suit No.713 of 1984 filed by Mrs.Kamla Chandwani, inter alia seeking modification of the earlier order dated 30th March, 1984 so as to permit the TRO to

confirm the auction sale held on 7th November, 1990 and also sought an order seeking extension of time to pay the balance purchase price. However, on noticing that after the grant of ad-interim order on 30th March, 1984 on the draft Notice of Motion, no steps have been taken to register the same, the learned Single Judge by his order dated 21st November, 1990 held that the non-registration of the Notice of Motion amounted to misuse of the process and accordingly vacated the ad-interim order passed on 30th March, 1984. Thereupon, the advocate for the respondent No.4 did not press the draft Notice of Motion seeking extension of time to pay the balance 75% of the purchase price. Thus, the obligation to pay the balance 75% of the purchase price amounting to Rs.54,00,000/- on or before 15 days from the date of auction sale held on 7th November, 1990, that is, on or before 22nd November, 1990 remained unchanged. It is not in dispute that the respondent No.4 has not paid the balance purchase price amounting to Rs.54,00,000/- within the stipulated time.

11. Since the respondent No.4 failed to pay the entire purchase price within the stipulated time, the petitioners by a letter dated 3rd December, 1990 informed the TRO that failure to pay the entire purchase price within the stipulated time

renders the sale invalid and the amount of Rs.18,00,000/- deposited by the respondent No.4 is liable to be forfeited and the disputed property has to be resold. It was further stated that the petitioners are entitled to get back the amount deposited by them and that the respondent No.4 is not entitled to claim 5% of the purchase price as compensation.

12. The T.R.O. without considering the plea of the petitioners that the sale has become invalid on account of the failure on the part of the respondent No.4 to deposit the entire purchase price within the stipulated time, passed an order dated 9th July, 1991, rejecting the application made by the petitioners under Rule 60 of Schedule II to the Act.

13. Thereafter, the TRO by his letter dated 10th July, 1991 called upon the respondent No.4 to pay the balance 75% of the purchase price amounting to Rs.54,00,000/- within two days. On 11th July, 1991, the respondent No.4 deposited the balance amount of Rs.54,00,000/- and on the same day the TRO passed an order confirming the auction sale of the disputed property in favour of the respondent No.4. Challenging the orders of TRO in rejecting the application under Rule 60, as well as the order of

TRO in confirming the auction sale in favour of respondent No.4, the present petition is filed. As stated earlier, during the pendency of the petition, the appeal filed by the petitioners against the order of the TRO dated 9th July, 1991 in rejecting Rule 60 application has been dismissed by C.I.T. by an undated order which was received by the petitioners on 24th April, 1992. The petitioners have also challenged the said undated order of C.I.T. by amending the writ petition.

14. This petition was admitted on 2nd September, 1991 with an interim order to the effect that during the pendency of the writ petition, the petitioners shall not be evicted from the disputed property and that the petitioners shall deposit in Court Rs.1,150/- per month towards the rent payable by the petitioners in respect of the disputed property.

15. To complete the narration of facts, it may be noted that against the order passed by the TRO on 31st August, 1989 rejecting the application of the petitioners under Rule 11 of Second Schedule to the Income Tax Act, the petitioners had filed a suit in the Bombay City Civil Court at Bombay being Suit No.4248 of 1992. By a judgment and order dated 2nd February, 2001, the learned Judge of the City

Civil Court at Mumbai has allowed the said suit by setting aside the order of the TRO dated 31st August, 1989.

16. Mr.Mistry, learned counsel appearing on behalf of the petitioners submitted that the order passed by the TRO on 9th July, 1991 in rejecting the application made by the petitioners under Rule 60 of the Second Schedule to the Act is liable to be quashed and set aside because, none of the grounds set out therein survive or are sustainable. The TRO had rejected the Rule 60 application filed by the petitioners firstly on the ground that the tenancy rights claimed petitioners has been rejected by an order dated 31st August, 1989 passed under Rule 11 of the second schedule to the Act. This ground does not survive because the order of the TRO dated 31st August, 1989 has already been set aside by a Judgment passed on 2nd February, 2001 in City Civil Court in Suit No.4248 of 1992. The second ground for rejecting the Rule 60 application was that the gift deed executed by the tax defaulter in favour of Mrs.Kamla Chandwani was invalid as the same has not been registered and consequently Mrs.Kamla Chandwani could not have created any valid tenancy in favour of the petitioners based on an invalid gift deed. This ground also does not survive because the gift deed dated 20th February, 1974 was lodged for

registration on 28th February, 1974 and the same has been finally registered on 20th September, 2003 and Index No.II has been issued. Since the registration of a document relates back to the date of execution of the document, the second ground of rejection is also without any merit. The third ground of rejection was that the tax arrears deposited by the petitioners was conditional and, therefore, the application was not in conformity with Rule 60 of the Second Schedule to the Act. Mr.Mistry submitted that even this ground of rejection is wholly unsustainable because, the petitioners had deposited the amount as specified in the proclamation of sale as well as further amount quantified by the TRO unconditionally and the same was confirmed by the TRO by his letter dated 29th November, 1990.

17. Mr.Mistry submitted that the letter addressed by the petitioners to the TRO on 3rd December, 1990 cannot be construed to mean that the tax arrears were deposited by the petitioners conditionally, because, by the said letter the petitioners had only brought to the notice of the TRO that in view of the failure on the part of the respondent No.4 to pay the balance 75% of the purchase price within 15 days from the date of the auction sale, the sale of the disputed property held on 7th November, 1990 stood cancelled and the TRO

was obliged to reauction the property and in that view of the matter, the petitioners had sought refund of the amounts deposited by them. Thus, the amounts deposited by the petitioners were not conditional as wrongly held by the TRO. However, Mr.Mistry fairly stated that in spite of the fact that the auction sale held on 7th November, 1990 stood cancelled on account of the failure on the part of the respondent No.4 to deposit the entire purchase price within the stipulated time, the petitioners want to pursue the challenge to the order rejecting the Rule 60 application and that the petitioners are not interested in seeking refund of the amounts deposited by them towards the tax arrears of Sultan Karim Mithani. He submitted that since none of the grounds set out in the order dated 9th July, 1991 are sustainable, the said order is liable to be quashed and set aside.

18. Mr.Mistry further submitted that the CIT was not justified in holding that the petitioners' interest were not affected by the sale and dismissing the appeal filed by the petitioners against the order dated 9th July, 1991. Mr.Mistry submitted that if the disputed property is auctioned on the footing that the said property belongs to Sultan Karim Mithani, then the claim of the petitioners that Mrs.Kamla Chandwani is the owner of

the disputed property and she was entitled to create tenancy in favour of the petitioners would be defeated. Apart from that, even the TRO had addressed a letter on 6th November, 1990 to the advocates of Mrs.Kamla Chandwani to the effect that on auction sale of the disputed property the petitioners will have to vacate the said property. In these circumstances, it cannot be said that the auction sale of the disputed property would not affect the interests of the petitioners.

19. Mr.Mistry further submitted that the expression 'person whose interests are affected by the sale' in Rule 60 of the Second Schedule to the Act as in Order 21 Rule 89(1) of the CPC must be construed widely so as to include even inchoate rights which a party may have over the property. Relying upon a decision of the Patna High Court in the case of *Radharaman Choudhary V/s. Gulab Thakur & Others* reported in *AIR 1959 Patna 50*, Mr.Mistry submitted that the petitioners whose interests were seriously affected by the sale had locus standi to file an application under Rule 60 and both the authorities below committed an error in rejecting the Rule 60 application filed by the petitioners.

20. As regards the order passed by the TRO on 11th July, 1991 confirming the auction sale held on

7th November, 1990, Mr.Mistry submitted that under Rule 57(1) of the Second Schedule to the Act, the auction purchaser is required to pay to the TRO 25% of the purchase money immediately on being declared as purchaser and in default of such payment, the property is liable to be resold. Rule 57(2) in the Second Schedule to the Act prescribes a mandatory condition to the effect that full amount of purchase money shall be paid by the purchaser to the TRO on or before the 15th day from the date of sale of the property. Rule 58 of the second schedule to the Act prescribes the procedure to be followed in case of default in payment. In the present case, even condition No.24 set out in the terms and conditions of sale attached to the proclamation of sale provides that under no circumstances the period of 15 days can be extended by any authority. Therefore, on acceptance of the bid for Rs.72,00,000/- given by the respondent No.4 in the auction sale of the disputed property held on 7th November, 1990, it was mandatory on the part of the respondent No.4 to deposit the entire amount of Rs.72,00,000/- on or before the fifteenth day from the date of the sale of the property, that is, on or before 22nd November, 1990. Admittedly, the respondent No.4 has not paid the entire purchase price within the above stipulated time. It is only after the TRO rejected the Rule 60 application of

the petitioners on 9th July, 1991 and addressed a letter on 10th July, 1991 calling upon the respondent No.4 to pay the balance purchase price within two days, the respondent No.4 paid the balance amount of Rs.54 lakhs on 11th July, 1991. Mr.Mistry submitted that there is no provision under the Act which empowers the TRO to grant extension or grant grace period for payment of the purchase price. Accordingly, Mr.Mistry submitted that in view of the breach of the mandatory provisions of the Act committed by the respondent No.4 in depositing the entire purchase price within the stipulated time, the sale of disputed property held on 7th November, 1990 had become void, nullity and nonest and, therefore, the TRO could not and ought not to have passed an order on 11th July, 1991 confirming the auction sale of the disputed property held on 7th November, 1990.

21. Relying upon various decisions of the Apex Court and other Courts, including the decision of the Apex Court in the case of *Manilal Shah V/s. Sardar Sayed Ahmed* reported in *AIR 1954 SC 349, Sardara Singh V/s. Sardara Singh* reported in *(1990) 4 SCC 90 and Rao Mahmood Khan V/s. Ranbir Singh* reported in *AIR 1995 SC 2195*, Mr.Mistry submitted that where the auction purchaser fails to pay the entire purchase price within the stipulated time, the sale is completely wiped off and no discretion

is left with any authority to grant extension of time to make payment of the balance purchase price. Accordingly, in the facts and circumstances of the case, the TRO was neither justified in granting extension of time nor justified in passing an order on 11th July, 1991 confirming the auction sale.

22. Mr.Mistry submitted that the conduct of the TRO in postponing the auction sale scheduled to be held on 5th November, 1990 without recording any reasons for postponing the auction was in breach of the mandatory requirement contained in Rule 15 of the Second Schedule to the Act. Similarly, the conduct of the TRO in writing a letter on 6th November, 1990 to the effect that the petitioners will have to vacate the disputed property after the auction sale was contrary to the express terms and conditions set out in the proclamation of sale wherein it was specifically stated that the sale will be on ‘as is and where is basis’ and subject to the tenancy rights claimed by the petitioners who were in possession of the disputed property. In these circumstances, the conduct of the TRO in rejecting the Rule 60 application of the petitioners and purporting to confirm the sale on 11th July, 1991 even though the respondent No.4 had committed breach of the mandatory provisions relating to the deposit of the entire purchase price within the

stipulated time clearly shows malafides on the part of the TRO. Accordingly, Mr.Mistry submitted that this Court be pleased to set aside the orders impugned in the petition and allow the application filed by the petitioners under Rule 60 of the second schedule to the Act.

23. Mr.Chinai, learned senior advocate appearing on behalf of the respondent No.4 submitted that the petitioners who are unsuccessful bidders and rank trespassers in the disputed property have colluded with Kamla Chandwani to deprive the Income Tax Department in recovering the dues of the tax defaulter. Relying upon a decision of the Apex Court in the case of *S.P.C. Naidu V/s. Jagannath* reported in *1994 (1) SCC 1,* Mr.Chinai submitted that the petitioners have come to this Court with unclean hands and, therefore, the petition deserves to be dismissed on that ground alone.

24. Mr.Chinai submitted that the petitioners have no locus to challenge the impugned orders because, the petitioners who claim to be tenants of the disputed property are not affected by the sale of the disputed property. In the suits filed by the petitioners in the Small Causes Court at Mumbai interim orders have already been passed and even this Court while admitting the present writ petition

on 2nd September, 1991 passed an order to the effect that the petitioners shall not be dispossessed pending the hearing of this petition. Thus, the petitioners cannot be dispossessed without the due process of law. Moreover, in the proclamation of sale, it is specifically stated that the auction of the disputed property will be on 'as is where is basis' and subject to the tenancy rights claimed by the petitioners who are in possession of the disputed property. In these circumstances, Mr.Chinai submitted that the petitioners rights are in no way affected by the sale and irrespective of the sale of the disputed property, it is open to the petitioners to establish their tenancy rights in the proceedings pending before the Small Causes Court at Bombay.

25. Mr.Chinai submitted that the claim of Kamla Chandwani that she is the owner of the disputed property was rejected by the TRO on 28th February, 1984. Challenging the said order, Kamla Chandwani had filed a suit bearing No.713 of 1984 in this Court and had obtained an interim order in the said suit on 30th March, 1984 and the said interim order was vacated on 21st November, 1990. Later on Mrs.Kamla Chandwani has withdrawn the said Suit No.713 of 1984. Thus, the order passed by the TRO holding that Mrs.Kamla Chandwani had no interest in

the disputed property has attained finality. Consequently, the claim of the petitioners that they are the tenants occupying the disputed property through the purported owner Mrs.Kamla Chandwani is unsustainable.

26. Mr.Chinai further submitted that although the order passed by the TRO under Rule 11 of the second Schedule to the Act on 31st August, 1989 has been set aside by the judgment dated 2nd February, 2001 passed in City Civil Court Suit No.4248 of 1992, the findings recorded therein which are binding on the petitioners clearly falsify the claim of the petitioners. In the said judgment, it is clearly held that the disputed property stood attached from 1969 and that Mrs.Kamla Chandwani failed to produce evidence and prove that the gift deed was validly executed on 20th February, 1974 even after attachment of the disputed property in the year 1969. It is further held that Mrs.Kamla Chandwani failed to establish that the transfer of the disputed property by gift deed was in consonance with Section 281 of the Act. In view of the above findings which are binding, Mr.Chinai submitted that the claim of the petitioners regarding their tenancy cannot be sustained. In any event, the interim order passed in Small Causes Court proceedings on 29th September, 1989 protects the interests of the

petitioners, if any, and since the petitioners cannot be evicted except by due process of law, it is not open to the petitioners to contend that their interests would be affected by sale of the disputed property.

27. Mr.Chinai further submitted that the petitioners are neither the defaulters themselves nor they are covered by the language used in Rule 60 of the second schedule to the Act and hence the petitioners were not entitled to make an application under Rule 60. The petitioners interest are not affected by the sale for two reasons. Firstly, the petitioners are not lawful tenants because Kamla Chandwani had no valid gift in her favour and consequently Kamla Chandwani could not have created tenancy in favour of the petitioners. Even the alleged gift deed had no sanctity because, at the relevant time Section 230A of the Act imposed restrictions on transfer of immovable property without the permission of the assessing officer. Therefore, before transferring the disputed property by way of gift, it was obligatory on the part of Sultan Karim Mithani to obtain Section 230A certificate and being a tax defaulter he would not have got that certificate. Hence, the alleged gift deed executed without a 230A certificate could not be registered. It is only after Section 230A of the

Act was omitted by the Finance Act, 2001 with effect from 1st June, 2001 the petitioners have allegedly got the gift deed registered in the year 2003 by suppressing the fact that the disputed property has already been sold by the Income Tax Department to the respondent No.4. Secondly, assuming the petitioners are tenants, their rights shall be crystalised in the proceedings pending before the Small Causes Court irrespective of the confirmation of the auction sale. Whether Kamla Chandwani was a legal owner of the disputed property and whether she could legally create tenancy rights in favour of the petitioners are the questions that would be considered in the proceedings pending before the Small Causes Court and it is only if the petitioners fail in those proceedings, the question of evicting them from the disputed property would arise. In these circumstances, Mr.Chinai submitted that since the sale did not affect the interests of the petitioners, the TRO was justified in rejecting the Rule 60 application filed by the petitioners and the CIT was justified in confirming the same.

28. With reference to the challenge to the order passed by the TRO confirming the auction sale, Mr.Chinai submitted that there is no irregularity or illegality of any nature whatsoever in the said order. Immediately after the acceptance of the bid

offered by the respondent No.4 in the auction sale held on 7th November, 1990, the respondent No.4 had deposited on the same day a sum of Rs.18 lakhs being 25% of the purchase price. Thereafter, by a letter dated 13th July, 1990 the respondent No.4 had called upon the TRO to obtain an order from the High Court in Suit No.713 of 1984 regarding confirmation of sale. Before any order could be passed to that effect, the petitioners on 19th July, 1990 filed an application before the TRO for setting aside the sale under Rule 60 of the second schedule to the Act. In view of the said application made by the petitioners and in consultation with the TRO, the respondent No.4 refrained from depositing the balance purchase price. Both the TRO and the respondent No.4 understood that the balance purchase price could be paid after deciding the application made by the petitioners under Rule 60 of the Second Schedule to the Act. Thus, the respondent No.4 though had money and was ready and willing to pay the balance purchase price did not deposit the same in the above circumstances.

29. Mr.Chinai further submitted that on receiving the Rule 60 application filed by the petitioners, the TRO was duty bound to stay all further process in the sale and consider the Rule 60 application filed by the petitioners. Therefore,

the respondent No.4 was under a bonafide belief that before deciding the Rule 60 application the TRO would not be able to accept the balance purchase price of the auction sale. He submitted that the ability to pay apart from the ready and willingness to pay on the part of the respondent No.4 is evidenced from the fact that the respondent No.4 paid the balance consideration on the very next day of receiving intimation from the TRO to pay up the balance amount.

30. With reference to various decision cited by the counsel for the petitioners, Mr.Chinai submitted that all those decisions are distinguishable on facts because in none of those cases the issue was relating to the interpretation of the words ‘persons whose interests are affected by sale’

31. Mr.Chinai further submitted that having succeeded in delaying the confirmation of the sale and taking advantage of the decision taken by the TRO in not accepting the balance purchase price, the petitioners by their letter dated 3rd December, 1990 had called upon the TRO to forfeit the amount paid by the respondent No.4 and sought refund of the amount deposited by them. The above letter addressed by the petitioners on 3rd December, 1990

clearly shows the malicious motive and intent of the petitioners to somehow trick the Income-tax authorities as well as the respondent No.4. Mr.Chinai submitted that the entire balance of convenience is in favour of respondent No.4 who has parted with the money for the past 16 years for the purchase of the property. If the sale is set aside, the respondent No.4 will suffer irreparable loss which cannot be compensated in terms of money. He submitted that if the sale is confirmed no loss would be caused to the petitioners who have colluded with Kamla Chandwani with a view to deprive the Income Tax Department of recovering its dues. Accordingly, Mr.Chinai submitted that the petition be dismissed with costs.

32. Mr.Kotangale, learned counsel appearing on behalf of the respondent Nos.1 to 3 fairly stated that though Rule 15 of the Second Schedule to the Act empowers the TRO to postpone the auction sale by recording reasons for such postponement, there is no material on record to show that the TRO had recorded reasons for postponing the auction sale scheduled to be held on 5th November, 1990. Mr.Kotangale further submitted that it is difficult to justify the action of the TRO in writing a letter on 6th November, 1990 to the advocates of Mrs.Kamla Chandwani to the effect that the petitioners will have to vacate the

disputed property after the auction sale even though it was specifically stated in the terms and conditions of sale that the auction shall be on ‘as is where is basis’ and subject to the tenancy rights claimed by the petitioners. Mr.Kotangale further admitted that there is no provision in the Act which empowers the TRO to grant extension of time or grace period to the auction purchaser to pay the balance purchase price beyond the period of 15 days from the date of the auction sale.

33. Mr.Kotangale, however, submitted that in the present case, there is sufficient evidence to show that the notices under Rule 2 of the Second Schedule to the Act were served on the tax defaulter much prior to the execution of the gift deed by the tax defaulter in favour of Mrs.Kamla Chandwani. Since the attachment of the disputed property on 3rd November, 1979 relates back to the date of the service of Rule 2 notice, the disputed property being under attachment the tax defaulter could not have gifted the disputed property in favour of Mrs.Kamla Chandwani. Consequently, Mrs.Kamla Chandwani could not have created tenancy rights in favour of the petitioners in the disputed property. In any event, the gift deed executed by the tax defaulter in favour of Mrs.Kamla Chandwani was not registered and, therefore, the tenancy rights based

on the unregistered gift deed had no sanctity whatsoever. In these circumstances, the petitioners had neither the locus to challenge the auction sale nor any right to seek an order for setting aside the sale. The fact that the gift deed has been subsequently registered would not make the invalid Rule 60 application to be valid. Therefore, the orders passed by the TRO and the CIT cannot be faulted.

34. With reference to the challenge to the order dated 11th July, 1991, Mr.Kotangale submitted that immediately after rejecting the Rule 60 application on 9th July, 1991, the TRO by his letter dated 10th July, 1991 had called upon the respondent No.4 to pay the balance purchase price within two days and in fact the respondent No.4 has paid the balance purchase price on 11th July, 1991 itself. Thus, the action of the TRO in confirming the auction sale on 11th July, 1991 is in accordance with law. Accordingly, Mr.Kotangale submitted that this petition is devoid of any merit and the same is liable to be dismissed.

35. On careful consideration of the rival submissions, we find that in the present case neither the order of the TRO in rejecting the Rule 60 application filed by the petitioners nor the

order of the TRO in confirming the sale of the disputed property in favour of the respondent No.4 are sustainable.

36. At the threshold, it would be appropriate to deal with the preliminary objection of the respondents regarding the locus of the petitioners in challenging the impugned orders passed by the TRO/CIT.

37. The respondents contend that the petitioners who are unsuccessful bidders and rank trespassers in the disputed property have colluded with Mrs.Kamla Chandwani to deprive the Income Tax Department to recover the dues of the defaulter and have approached this Court with unclean hands and, therefore, the petitioners have no locus to file the present petition and the petition is liable to be dismissed on that ground alone. There is no merit in this contention, because, to maintain an application under Rule 60 of the Second Schedule to the Act, what is relevant apart from other conditions set out therein, is that the person making such application must be either a tax defaulter himself of a person whose interests are affected by the sale. A person whose interests are likely to be affected by the sale may have participated in the auction. But the failure to

purchase the property in the auction would not disentitle him from making an application under Rule 60 for setting aside the sale so long as he is in a position to establish that his interests are affected by the sale. Therefore, Rule 60 application by an unsuccessful bidder would be maintainable if his interests are affected by the sale. While considering the Rule 60 application, the TRO cannot adjudicate upon the title of the applicant over the property that is sold. Moreover, no competent Court has declared the petitioners to be rank trespassers on the disputed property. Therefore, the TRO could not have rejected the application on the ground that the petitioners are rank trespassers. Similarly, the argument that the petitioners have colluded with Mrs.Kamla Chandwani to deprive the Income Tax Department to recover the dues of the defaulter, is also without any merit, because, admittedly the petitioners have deposited not only the entire tax arrears payable by Mr.Sultan Karim Mithani but the petitioners have also deposited the entire amount of interest, costs and compensation quantified by the TRO. Admittedly, petitioners are in possession of the disputed property and if the sale adversely affects the interest of the petitioners, then, they are entitled to seek an order for setting aside the sale. Therefore, the argument that the petitioners have no

locus to file Rule 60 application or to challenge the orders passed thereon by filing the present writ petition is without any merit and is hereby rejected.

38. The question then to be considered is, whether the petitioners are the persons whose interests are affected by the sale ? It is not in dispute that the petitioners are in possession of the disputed property since 1974-75. However, there is dispute regarding the ownership of the disputed property. According to the revenue, the tax defaulter Sultan Karim Mithani is the owner of the disputed property, whereas, according to the petitioners, Mrs.Kamala Chandwani is the owner of the disputed property. Since the TRO by an order dated 31/8/1989 has rejected the claim of the petitioners that Mrs. Kamla Chandwani as owner of the disputed property has validly and legally created tenancy rights in favour of the petitioners, suits have been filed by the petitioners in the Small Causes Court at Bombay in September, 1989. In the said suits, interim relief has been granted in favour of the petitioners and the said suits are still pending before the Small Causes Court at Bombay.

39. During the pendency of the said suits,

the disputed property is auctioned for recovering the tax arrears of Sultan Karim Mithani. The question is, whether the petitioners are the persons affected by the sale so as to seek an order for setting aside the sale by depositing the amount of tax for the recovery of which the disputed property is sold. As stated earlier, the case of the petitioners is that Mrs.Kamla Chandwani is the owner of the disputed property and she had validly created tenancy rights in favour of the petitioners. If the disputed property is sold for recovering the tax arrears payable by Sultan Karim Mithani, then, it will obviously affect the case of the petitioners in establishing that the disputed property belongs to Mrs.Kamla Chandwani. It is neither the case of the revenue nor the case of the respondent No.4 that on auction sale of the disputed property, the petitioners would become the tenants of the auction purchaser. On the contrary, the specific argument of the revenue as well as the respondent No.4 is that the petitioners must establish before the Small Causes Court that Mrs.Kamla Chandwani could validly and legally create tenancy rights in the disputed property in favour of the petitioners. If the disputed property is sold by treating it to be the property of the tax defaulter Sultan Karim Mithani, then it would certainly create difficulty for the petitioners in establishing before the Small Causes

Court that the disputed propery belongs to Mrs.Kamla Chandwani. The Small Causes Court has granted interim relief based on the plea of the petitioners that Mrs.Kamla Chandwani has become absolute owner of the disputed property under a gift deed dated 20/2/1974 and that she had validly created tenancy rights in favour of the petitioners. Thus, the sale of the disputed property for recovering the tax arrears of Sultan Karim Mithani is bound to seriously prejudice the case of the petitioners and consequently, the final outcome of the suits pending before the Small Causes Court.

40. There may be several impediments in the way of the petitioners in establishing that Mrs.Kamla Chandwani could validly create tenancy rights in favour of the petitioners. But, if the sale of the property shakes the very foundation of the petitioners claim, then the petitioners would certainly be the persons affected by the sale. In other words, irrespective of the fact that Mrs.Kamla Chandwani had given up her claim over the disputed property and irrespective of the fact that the tax defaulter is disputing the tenancy rights claimed by the petitioners, if the sale itself prejudically affects the claim of the petitioners, then they would be persons affected by the sale.

41. It is pertinent to note that the application made by the petitioners has been rejected by the TRO mainly on three grounds. Firstly, it is held that by an order dated 31st August, 1989 the claim of the petitioners has been rejected under Rule 11 of the Second Schedule to the Act. Secondly, the alleged gift deed executed by the tax defaulter Sultan Karim Mithani in favour of Mrs.Kamla Chandwani being not registered, Mrs.Kamla Chandwani could not have created tenancy rights in favour of the petitioners and thirdly the amounts deposited by the petitioners along with the application under Rule 60 of the Second Schedule to the Act being conditional, the application under Rule 60 was liable to be dismissed.

42. Admittedly, the order passed by the TRO on 31st August, 1989 under Rule 11 of the Second Schedule to the Act has been set aside in Appeal by the City Civil Court on 2nd February, 2001 in Suit No.4248 of 1992 and hence the first ground of rejection does not survive. Strong reliance was placed by the Counsel for the respondents on certain observations made by the learned Judge of the City Civil Court at Bombay in the said judgment dated 2nd February, 2001 regarding the genuineness of the gift deed and the tenancy rights created in favour of the petitioners. All those observations are only

prima-facie observations and cannot be read out of context. The issue before the City Civil Court was, whether the TRO was justified in rejecting the objections filed by the petitioners for sale of the disputed property under Rule 11 of the Second Schedule to the Act. The learned Judge of the City Civil Court has held that the enquiry under Rule 11 is limited to consider as to whether the claimant has some interest in or was possessed of the property in question and does not extent to adjudicate upon the title to the property. Therefore, the TRO could not have held that the gift was invalid and consequently the tenancy was invalid. Accordingly, the learned Judge has set aside the order of TRO, passed under Rule 11 of the Second Schedule to the Act. While setting aside the order of the TRO, the learned Judge referring to the service of the Rule 2 notice upon the tax defaulter has doubted the genuineness of the tenancy rights claimed by the petitioners. However, these are only prima facie observation and all that has been held is that the TRO has exceeded his jurisdiction in enquiring into the title in the property and accordingly set aside the order passed by the TRO. Therefore, the prima facie observations made by the learned Judge in the Bombay City Civil Court regarding the title in the property cannot be a ground to reject the application made under Rule 60.

43. The second reason given by the TRO for rejecting the Rule 60 application is that the gift deed dated 20th February, 1974 was not registered at the relevant time. It is an admitted fact that the said gift deed was lodged for registration on 28th February, 1974 and the same has been registered on 20th September, 2003. Once a document is registered, it relates back to the date of the execution of the document. In any event, the TRO could not have gone into the question as to whether the tenancy rights created before registration of the gift deed are valid or not. Similarly, the argument that in the absence of section 230A certificate the tax defaulter could not have gifted the property is also without any merit because, the gift deed is in fact registered in the name of Kamla Chandwani and the same remains unchallenged.

44. The third reason given by the TRO for rejecting the Rule 60 application is that the amounts deposited by the petitioners along with the Rule 60 application were conditional. This is not correct. The amount of Rs.30,00,000/- specified in the proclamation of sale was deposited by the petitioners along with the Rule 60 application

unconditionally. The petitioners have deposited further sum of Rs.74,079/- as quantified by the TRO unconditionally. The letter addressed by the petitioners on 3rd December, 1990 does not make the deposits already made conditional, because, by the said letter the petitioners have only brought to the notice of the TRO that the auction held on 7th

November, 1990 has become invalid in view of the failure on the part of the respondent No.4 to deposit the entire purchase price within the time stipulated under the Act. Under Rule 57 of the Second Schedule to the Act, it is mandatory that the auction purchaser must deposit the entire purchase price on or before the fifteenth day from the date of the sale and failure to comply with the said mandatory conditions renders the sale a nullity. In the present case, though the due date for depositing the entire purchase price was 22/11/1990, admittedly the respondent No.4 auction purchaser has deposited the entire purchase price only on 11/7/1991. Therefore, the letter dated 3rd December, 1990 merely states that the sale has become invalid on account of the respondent No.4 to deposit the entire purchase price within the stipulated time and it does not make the deposits conditional. In the letter dated 3rd December, 1990 although the petitioners have claimed refund of the amount

deposited by them in view of the sale becoming invalid due to the failure of the respondent No.4 to deposit the entire purchase price within the stipulated time, Mr.Mistry, learned counsel for the petitioners on instructions fairly stated that the petitioners are desirous of pursuing the Rule 60 application irrespective of the sale becoming invalid due to the failure on the part of respondent

No.4 to deposit the entire purchase price within the stipulated time. Thus, none of the grounds given by the TRO for setting aside the Rule 60 application can be sustained. Accordingly, we hold that the petitioners are the persons whose interests are affected by the sale of the disputed property and they are entitled to get the sale of the disputed property held on 7/11/1990 set aside by deposting the amounts quantified by the T.R.O.

45. Once the Rule 60 application filed by the petitioners is allowed, the order dated 11th July, 1991 passed by the TRO in confirming the auction sale cannot be sustained. In such a case, ordinarily the respondent No.4 auction purchaser would be entitled to return the money paid or deposited by him with interest and 5% compensation as set out in Rule 60 of the Second Schedule to the Act.

46. However, in the present case, it is an admitted fact that the respondent No.4 has failed to deposit the entire purchase price within the time stipulated under the Act. According to the petitioners, failure to deposit the entire purchase price within the stipulated time, not only renders the sale invalid but also renders the 25% deposit made on the date of auction liable to be forfeited.

47. It is not necessary for us to go into the question as to whether the failure on the part of the auction purchaser to deposit the entire purchase price within the stipulated time renders the 25% purchase price deposited on the date of auction sale liable to be forfeited. Suffice it to say that the order of the TRO in confirming the auction sale on 11th July, 1991 is wholly unjustified because, in the present case, the respondent No.4 has not deposited the entire purchase price on or before the fifteenth day from the date of sale, in spite of the specific provision contained in Rule 57 of the second schedule to the Act and in spite of specific clause No.24 contained in the terms and conditions of sale. The sale was held on 7th November, 1990 and as per Rule 57 and clause 24 of the terms and conditions of sale, the respondent No.4 was bound and liable to deposit the entire purchase price on

or before 22nd November, 1990. However, the respondent No.4 after the auction sale held on 7th November, 1990 has deposited Rs.18,00,000/- (25% of the total sum of Rs.72,00,000/-) on 7th November, 1990 and balance amount of Rs.54,00,000/- has been deposited after considerable period of time on 11th July, 1991.

48. It was contended by the counsel for the respondent No.4 that both the respondent No.4 as well as the TRO were under the impression that till the Rule 60 application is decided the auction purchaser need not deposit the balance amount of purchase price. There is no merit in this contention, because there is neither any provision under the Act which permits the auction purchaser to deposit the entire purchase price beyond the period of fifteen days from the date of sale nor there is any provision empowering any authority to grant extention of time. Therefore, the TRO could not have accepted the balance purchase price beyond the period of fifteen days from the date of sale. The argument that the respondent No.4 had the requisite money and that he was ready and willing to pay the entire purchase price within the stipulated time cannot be accepted, because, in our opinion, under Rule 57 read with the terms of conditions of sale, it was mandatory on the part of respondent No.4 to

deposit the entire purchase price on or before the fifteenth day from the date of sale. Once it is admitted that the entire purchase price has not been deposited within the stipulated time, then, it must be held that the sale had become invalid and the TRO could not have confirmed the sale.

49. In the result, the petition succeeds. The order dated 9th July, 1991 passed by the TRO rejecting the Rule 60 application filed by the petitioners as well as the undated order of the CIT (Exhibit "Y-4") confirming the aforesaid order of the TRO are quashed and set aside and the application filed by the petitioners under Rule 60 of the Second Schedule to the Act is allowed. Consequently, the order dated 11th July, 1991 passed by the TRO confirming the auction sale held on 7/11/1990 stands set aside in the light of allowing Rule 60 application filed by the petitioners. We further hold that the order of TRO dated 11/7/1991 in confirming the auction sale of the disputed property is also liable to be set aside on the ground that the sale had become invalid due to the failure on the part of the respondent No.4 to deposit the entire purchase within the time stipulated under the Act.

50. Rule is made absolute in the above terms

with no order as to costs.

(DR.S. RADHAKRISHNAN, J.)

(J.P. DEVADHAR, J.)